

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-03**

DATE ISSUED: January 31, 2000

ISSUED TO: Duane Schurman, Attorney, Freemont Township

CITIZEN'S REQUEST FOR OPINION

On December 22, 1999, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jeff Amoth asking whether the Freemont Township Board of Supervisors violated N.D.C.C. §§ 44-04-19, 44-04-19.2, and 44-04-20 by excluding him from a meeting of the Board without following the necessary procedures for holding an executive session and by failing to provide sufficient public notice of the special meeting.

FACTS PRESENTED

The Board of Supervisors (Board) for Freemont Township in Cavalier County held a special meeting on November 29, 1999, to consider whether to appeal a decision of the State Water Board regarding a drainage complaint by Mr. Amoth. Notice of the meeting was sent to all Board members and to Mr. Amoth, but was not filed with the Cavalier County Auditor. The Board voted at the meeting to appeal the decision. According to the Board's attorney, "at the close of the meeting, I requested the board members to stay to discuss exactly what areas they wanted to cover in their appeal." Mr. Amoth was not allowed to attend this separate gathering, nor was a notice prepared for the gathering.

ISSUES

1. Whether the Board violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by refusing to allow Mr. Amoth to attend the gathering of the Board which followed its November 29 special meeting.
2. Whether the Board violated N.D.C.C. § 44-04-20 by failing to provide sufficient public notice of its November 29 special meeting.

ANALYSES

Issue One:

All meetings of a public entity are required to be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19. The term "meeting" as it is used in N.D.C.C. § 44-04-19 includes every gathering of a quorum of the governing body of a public entity regarding public business. N.D.C.C. § 44-04-17.1(8). Thus, there must be specific statutory authority for a governing body like the Board to exclude the public from a gathering of a quorum of its members to discuss public business.

The Board's attorney cites N.D.C.C. § 44-04-19.1 as the Board's authority for holding a meeting which was not open to the public. Since the purpose of the Board's gathering with its attorney was to discuss a possible appeal by the Board from a decision of the State Water Board, it is conceivable that the Board's discussion could have been closed to the public as "attorney consultation" under N.D.C.C. § 44-04-19.1(4). However, the Board completely failed to follow the procedures required under N.D.C.C. § 44-04-19.2(2) to properly exclude the public from its discussion.

The Board argues that the procedures in N.D.C.C. § 44-04-19.2(2) only need to be followed if the executive session or closed meeting is held during an open meeting. Since the Board's gathering was a separate "meeting," it concludes that the procedures in N.D.C.C. § 44-04-19.2(2) did not have to be followed in order to close the meeting to the public. This argument is technically correct: the procedures in N.D.C.C. § 44-04-19.2 only apply to executive sessions which are held during an open meeting. However, the argument overlooks the fact that the Board's authority to exclude the public from "attorney consultation" under N.D.C.C. § 44-04-19.1 can only be invoked during an open meeting.

N.D.C.C. § 44-04-19.1(2) states: "That portion of a meeting during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2." Under N.D.C.C. § 44-04-19.2(2)(a), before a governing body closes a part of its meeting, the body first must convene in an open session and pass a motion to hold an executive session. Other procedural requirements in N.D.C.C. § 44-04-19.2(2) also must be followed, such as announcing the topics and legal authority for the executive session and recording the session. The Board can hold a closed "attorney consultation" under N.D.C.C. § 44-04-19.1(2) only by following these procedures.

Since the Board failed to follow the procedural requirements in N.D.C.C. § 44-04-19.2, the Board did not properly hold a closed meeting under N.D.C.C. § 44-04-19.1 and accordingly violated N.D.C.C. § 44-04-19 by excluding Mr. Amoth from the meeting.

Issue Two:

Because the November 29 meeting of the Board was a special meeting, the only topics the Board could properly discuss at the meeting were the topics listed in the notice of the meeting. N.D.C.C. § 44-04-20(6). In particular, the Board was required to mention in the notice of its special meeting that it may be closing a part of its meeting to the public. 2000 N.D. Op. Att'y Gen. 01.

The Board admits that it did not file the notice of the November 29 special meeting with the Cavalier County Auditor. The Board alleges that it is not alone in failing to provide notice to the county auditor. It claims that no townships in Cavalier County file notice of their special meetings with the county auditor. This argument is meritless, even if true. Notice of all township board meetings must be filed with the county auditor. N.D.C.C. § 44-04-20(4). The fact other townships may also be failing to file meeting notices does not excuse the Board's failure to do so.

The Board provided notice of the meeting to several interested persons, including Mr. Amoth. Providing notice to interested persons is not a substitute for complying with the provisions of N.D.C.C. § 44-04-20. 1998 N.D. Op. Att'y Gen. 0-61. Filing notice of meetings with a county auditor is particularly important in this situation because the Board has neither a main office nor a regular meeting location at which to post the notice. Therefore, it is my opinion that the notice of the Board's November 29 meeting was not in substantial compliance with N.D.C.C. § 44-04-20.

CONCLUSIONS

1. The Board violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by excluding Mr. Amoth from an "attorney consultation" which was not closed in compliance with required statutory procedures.
2. The Board violated N.D.C.C. § 44-04-20 by failing to provide sufficient public notice of its November 29 special meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

The failure to give notice and properly close the meetings on November 29 cannot be completely remedied because no recording was made of the meeting. The meeting was limited to a possible appeal from a decision of the State Water Board. All interested persons apparently attended the meeting. Therefore, the notice violation can be sufficiently remedied in this case by supplementing the minutes of the meeting with the position and thoughts of each Board member on the appeal, if stated at the meeting. This will allow members of the public who could not obtain notice of the meeting to learn the position and thoughts of each Board member on the appeal. The Board also must file a revised notice of the November 29 meeting with the Cavalier County Auditor which describes the closed meeting on

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November 29 and indicates how the supplemented minutes of both meetings may be obtained.

The discussion during the "attorney consultation" which followed the special meeting must be repeated by each Board member in a properly noticed open meeting unless either 1) the Board properly closes the meeting under N.D.C.C. § 44-04-19.2 or 2) repeating the discussion is unnecessary because, as the Board's attorney suggests, the question of appealing the decision of the State Water Board is now moot.

Failure to disclose a record, issue a notice of a meeting, or take other corrective measures as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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